

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | | |
|-----------------------------------|---|--------------------------------|
| GREENSPRINGS BAPTIST CHRISTIAN |) | Case No. 09-1054 SC |
| FELLOWSHIP TRUST, |) | |
| |) | ORDER DENYING DEFENDANTS' |
| Plaintiff, |) | <u>SECOND MOTION TO STRIKE</u> |
| |) | |
| v. |) | |
| |) | |
| JAMES P. CILLEY, an individual; |) | |
| MARK A. SCHMUCK, an individual; |) | |
| and TEMMERMAN, CILLEY & KOHLMANN, |) | |
| LLP, |) | |
| |) | |
| Defendants. |) | |
| |) | |

I. INTRODUCTION

This is a suit for malicious prosecution brought by Plaintiff Greensprings Baptist Christian Fellowship Trust ("Greensprings") against Defendants Robert Miller ("Bob"), Barbara Miller ("Barbara"), and Anne Miller ("Anne," and collectively, "the Millers"), as well as the Millers' former attorneys, Defendants James Cilley ("Cilley"), Mark Schmuck ("Schmuck"), and their firm, Temmerman, Cilley & Kohlmann, LLP ("TCK," and collectively, "Attorney Defendants"). ECF No. 1 ("Compl."). Greensprings has settled its dispute with the Millers and they have been dismissed from this action, leaving Attorney Defendants as the sole defendants. Now before the Court is Attorney Defendants' Renewed Special Motion to Strike the Second Amended Complaint. ECF No. 121

1 ("Mot."). Greensprings filed an Opposition, ECF No. 122 ("Opp'n"),
2 and Attorney Defendants filed a Reply, ECF No. 130 ("Reply"). For
3 the following reasons, the Court DENIES Attorney Defendants'
4 Motion.

5
6 **II. BACKGROUND**

7 The history of this action spans more than eleven years and
8 three civil actions. A detailed background is provided in the
9 Court's July 28, 2009 Order granting Defendants' first Anti-SLAPP
10 motion. See ECF No. 60 ("July 28, 2009 Order"). A brief synopsis
11 follows below.

12 **A. Elsie Turchen's Offer**

13 On November 23, 2000, Elsie Turchen ("Turchen") wrote a one-
14 page letter to Bob and Barbara Miller, the adoptive parents of
15 Turchen's biological great-granddaughter, Molly Miller ("Molly").
16 Id. at 3. Turchen offered the gift of a three-bedroom house in
17 Belmont, California ("the Belmont house") for the benefit of Molly
18 as well as Anne, Bob and Barbara's biological daughter. Id. at 3-
19 4. Turchen noted that because she was "very ill," she needed to
20 know soon if Bob and Barbara were interested. Id.

21 Before Bob or Barbara could accept this gift, Turchen died.
22 Id. In an attempt to reach Turchen, Barbara was put in contact
23 with Christine Dillon ("Dillon"), an employee of Ber Management
24 ("Ber"), an entity that apparently assisted in management of
25 Turchen's properties and Greensprings's properties. Id. Dillon
26 told Barbara that Turchen did not own the Belmont house at the time
27 she made the offer, but Dillon wanted to honor Turchen's gift by
28 giving the Millers the equivalent amount of money. Id. Dillon

1 later informed Barbara that the house had been appraised for
2 approximately \$500,000. Id. at 5.

3 Barbara and Bob decided that the money should go to the Maui
4 Preparatory Academy ("MPA"), which was planning to buy land near
5 the Millers' home in Maui. Id. In 2002, two checks totaling
6 \$500,000 signed by Donald Bohn ("Bohn"), another employee of Ber,
7 were issued from "Real Estate Trust" to "First Hawaiian Title
8 Company." Id. The Millers then wrote to Bohn and Dillon,
9 explained that "First Hawaiian Title Company" did not exist, and
10 asked them to reissue the checks to "First Hawaii Title
11 Corporation." Id. Bohn and Dillon did not respond. Two years
12 later, on November 14, 2004, the Millers wrote Dillon and Bohn
13 reiterating their demand for a reissued check. Id. at 6-7. On
14 January 10, 2005, Bohn sent the Millers a cashier's check for
15 \$500,000 made out to MPA. Id. at 6.

16 Barbara, however, no longer wanted the money to be given to
17 MPA. Id. Around this time, the Miller Family Foundation ("the
18 Foundation"), a non-profit entity run by Bob and Barbara, made a
19 \$200,000 pledge to Seabury Hall, a college preparatory school in
20 Hawaii. Id. at 9. Barbara sent another letter to Dillon and Bohn
21 requesting that the check be reissued to Seabury Hall and two other
22 academic institutions. Id. at 7. Bohn referred Barbara to
23 attorney Carleton Briggs ("Briggs"), counsel for Greensprings. Id.

24 On August 11, 2005, Briggs sent Barbara a letter informing her
25 that he had been ordered to "assume direct control of all the
26 accounts and to suspend charitable donations or unapproved
27 expenditures" pending the disposition of a lawsuit brought by Penny
28 Anderson ("Anderson"), granddaughter of Turchen, against Dillon,

1 Greensprings, and others. Anderson v. Dillon, No. Civ. 445617 (San
2 Mateo Super. Ct., filed Mar. 18, 2005) ("Anderson"). Anderson
3 alleged in her complaint that Dillon, Bohn, Briggs, and
4 Greensprings were part of a conspiracy to defraud Turchen and her
5 heirs and assigns of more than \$20 million in real property. Id.

6 Briggs requested that Barbara return the \$500,000 check and
7 promised that it would be deposited with Greensprings in a separate
8 interest-bearing account pending the resolution of Anderson. July
9 28, 2009 Order at 8. Barbara returned the check. Id. However,
10 the was money paid into Turchen's estate as part of the settlement
11 in the Anderson suit, and was never submitted to the academic
12 institutions selected by Barbara and Bob. Id.

13 **B. The Miller Action**

14 The Millers engaged Attorney Defendants to determine if the
15 \$500,000 could be recovered. On July 30, 2007, Cilley e-mailed the
16 Millers a seven-page letter in which he provided a factual summary
17 of the Millers' case and performed a legal evaluation of their
18 potential causes of action. Rice Decl. Ex. A ("July 30, 2007 Op.
19 Letter") at 3.¹ Cilley wrote that the Millers had no claim against
20 Turchen's estate, concluding that Turchen's letter was not
21 "enforceable as a contract, will, trust or other testamentary
22 document." Id. at 3. However, Cilley identified four potential
23 causes of action against Bohn, Dillon, Briggs, and Greensprings:
24 establishment of a constructive trust; breach of contract;
25 negligent misrepresentation; and declaratory relief. Id. at 4-6.
26 Cilley noted that "these causes of action may only be enforced by
27

28 ¹ James E. Rice ("Rice"), counsel for Greensprings, filed a
declaration in support of Greensprings' Opposition. ECF No. 123.

1 you on behalf of your daughters, not by you or your wife directly,
2 as the underlying gift from Elsie [Turchen] was intended for them
3 and not for you." Id. at 4.

4 The constructive trust cause of action was premised on the
5 theory that Bohn sent the \$500,000 check to the Millers in
6 satisfaction of Turchen's intent to make a gift. Id. Cilley noted
7 that a weakness of this claim was "case law that states that where
8 a donor retained the right to stop payment on a check, delivery is
9 not complete and no gift is made." Id. at 5. Under this law,
10 because Briggs not only retained the right to stop payment, but
11 demanded return of the check, there was no enforceable gift. Id.

12 The breach-of-contract claim was premised on the theory that a
13 contract existed between Greensprings and the Millers whereby
14 Greensprings promised to pay the Millers \$500,000 in exchange for
15 the Millers' forbearance of any claim against the estates of
16 Turchen or her son, Ward Anderson. Id. at 6. Cilley noted that
17 this cause of action was susceptible to an argument that no valid
18 consideration existed, because none of the Millers had a valid
19 claim against Turchen's or Ward Anderson's estate. Id. Cilley
20 concluded that "it is unclear how a court would decide this issue."
21 Id.

22 The negligent misrepresentation claim was premised on the
23 theory that by not making a claim against Turchen's estate, the
24 Millers reasonably relied on Dillon's promise to pay \$500,000 to
25 charities of their choosing. Id. Cilley identified two "concerns"
26 with this cause of action -- the invalidity of the claim against
27 Turchen's estate, and the one-year statute of limitations for
28 claims against a decedent. Id. at 6-7. Cilley concluded by

1 stating that Attorney Defendants were "in the process of drafting a
2 complaint against Greensprings." Id. at 7.

3 One week later, on August 8, 2007, Cilley e-mailed Bob a draft
4 of the complaint. Robert Miller Decl. Ex. H ("Aug. 7, 2007
5 Letter").² Cilley wrote that "after reviewing the file and the
6 underlying facts, it is my opinion that the Miller Family
7 Charitable Foundation should not be a Plaintiff in this matter."
8 Id. Cilley wrote that despite the fact that Bob and Barbara made
9 financial commitments "based on the representations of the
10 defendants," the fact that any promise made to pay the \$500,000 was
11 made "to (or on behalf of) your daughters, not to the Foundation"
12 was "fatal to any causes that the Foundation may have against the
13 defendants." Id. Cilley wrote that he would not include the
14 Foundation as a plaintiff unless Bob instructed him otherwise. Id.

15 On August 17, 2007, Attorney Defendants filed a complaint on
16 behalf of Barbara and Anne against Greensprings, Bohn, Dillon, and
17 Briggs in state court, which the defendants subsequently removed.
18 Miller v. Greensprings Baptist Christian Fellowship Trust, No. 07-
19 4776 (N.D. Cal. Sept. 17, 2007) ("Miller"). In this initial
20 complaint, Barbara and Anne alleged that Greensprings had breached
21 a contract with the Millers, unlawfully converted the \$500,000 in
22 question, and committed fraud. July 28, 2009 Order at 8. The
23 Millers requested that the \$500,000 be paid to Anne and Molly
24 personally, and they also requested punitive damages. Id. The
25 Millers claimed that they had relied upon Dillon and Briggs'
26 assurances, and that based on these assurances they had made no

27
28 ² Robert Miller filed a declaration in support of Greensprings'
Opposition. ECF No. 126.

1 claim against Turchen's estate and had returned the certified check
2 to Greensprings. Id. at 8-9. Per Cilley's August 8, 2007 Letter,
3 the Foundation was not named as a plaintiff. Id.

4 Magistrate Judge Larson dismissed the complaint with leave to
5 amend. Id. at 9. The court found that the Millers had failed to
6 make a showing of damages, because the \$500,000 in question was to
7 be donated to charities and not to be delivered to the Millers.
8 The court also found that because Turchen's attempted gift was
9 never accepted, Barbara and Anne had failed to explain how
10 Turchen's attempted gift resulted in viable claims against either
11 Greensprings or Turchen's estate. Id.

12 On March 28, 2008, Attorney Defendants filed a First Amended
13 Complaint. Miller, ECF No. 49 ("Miller FAC"). The FAC added
14 several allegations: that Dillon, Bohn, and Greensprings were part
15 of a conspiracy to defraud Turchen; that Dillon assumed the name
16 "Beth Anderson" and held herself out as Turchen's granddaughter;
17 and that Greensprings agreed to pay the Millers \$500,000 to avoid
18 "increased scrutiny." Id. The FAC included a claim that the
19 Millers had pledged \$200,000 to Seabury Hall in reliance on
20 assurances made by the Miller defendants. July 28, 2009 Order at
21 9. The Millers also added two new causes of action: intentional
22 and negligent interference with the right to inherit. Id. Bob and
23 Barbara were named as new plaintiffs, individually, and Briggs was
24 named as a defendant. Id.

25 Briggs declares that upon reading the Miller FAC, he
26 telephoned Schmuck, demanding to see communication from Seabury
27 Hall commencing a collection action against Robert and Barbara on
28

1 their pledge. Briggs Decl. ¶ 19.³ Briggs declares that in a later
2 conversation with Cilley, Briggs pointed out that Seabury Hall
3 apparently viewed the Millers' pledge as being from the Foundation,
4 rather than from the Millers personally. Id. Briggs declares that
5 Cilley responded that the Millers would merely amend the complaint
6 again to add the Foundation as a plaintiff and "keep on amending"
7 until Greensprings paid \$200,000 to the Millers or gifted that
8 amount in satisfaction of their pledge to Seabury Hall. Id.

9 On August 7, 2008, Magistrate Judge Larson dismissed the FAC
10 without leave to amend, finding many of the flaws present in the
11 first complaint uncured in the FAC. Miller, ECF No. 97 ("Miller
12 Second Dismissal Order"). Specifically, the court found that
13 Plaintiff's breach of contract claim was time-barred, the
14 interference with the right to inherit claims were unrecognized by
15 existing law, and that the Millers had alleged no cognizable
16 damages. Id. The court found that the \$200,000 pledge to Seabury
17 Hall was made not by the Millers, but by the Foundation, a non-
18 party entity currently in suspended status. Id. at 9.

19 **C. The Current Action**

20 On March 10, 2009, Greensprings brought the present malicious
21 prosecution suit against the Millers and Attorney Defendants. ECF
22 No. 1 ("Compl."). Three days later, it filed its First Amended
23 Complaint. ECF No. 4 ("FAC"). In it, Greensprings alleged that
24 the Attorney Defendants acted without probable cause in bringing
25 the Miller action "because, as a matter of law, no reasonable
26 attorney would regard as tenable the prosecution of the claims
27

28 ³ Briggs filed a declaration in support of Greensprings' Opposition. ECF No. 128.

1 contained in the above-referenced complaint, and/or they
2 unreasonably neglected to research the law in making the
3 determination to proceed against plaintiff." Id. ¶¶ 18-19.
4 Greensprings also alleged that Attorney Defendants acted
5 maliciously because the complaint was filed with knowledge "that
6 the claims asserted therein against plaintiff were false and/or the
7 proceedings were initiated for the purpose of depriving the
8 plaintiff of the beneficial use of its property and/or to destroy
9 plaintiff by depriving it of its tax-exempt status and/or the
10 proceedings were initiated primarily because of hostility and ill
11 will on the part of [Barbara and Anne] and/or the proceedings were
12 initiated for the purpose of coercing plaintiff into settling with
13 [Barbara and Anne]." Id. ¶ 22. As evidence of malice,
14 Greensprings attached a November 14, 2004 letter from Miller to
15 Dillon and Bohn which it claimed "threatened an investigation of
16 Dillon and Bohn's handling of Elsie Turchen's estate" unless
17 \$500,000 was paid as directed by Bob and Barbara. Id. ¶ 23.

18 The Millers and Attorney Defendants then separately filed
19 special motions to strike the FAC under California's anti-SLAPP
20 statute, Cal. Code. Civ. Proc. § 425.16. ECF Nos. 28, 38. On July
21 28, 2009, the Court granted Defendants' anti-SLAPP motions. See
22 July 28, 2009 Order. The Court found that by bringing the Miller
23 suit, Defendants were engaged in an act in furtherance of their
24 right of petition, triggering the anti-SLAPP statute. Id. at 17.
25 The Court found that Greensprings had failed to make the required
26 minimal showing that the Miller suit was initiated with malice.
27 Id. at 23. The Court found that the single piece of evidence cited
28 by Greensprings -- the November 14, 2004 letter from Bob and

1 Barbara to Dillon and Bohn -- was "typical pre-litigation
2 posturing" and not evidence of malice. Id. The Court concluded
3 that while the arguments made in the Miller complaints were
4 "objectively poor and therefore made without probable cause, there
5 is no indication that they were made in bad faith." Id. at 25.
6 The Court granted Greensprings leave to amend its complaint "if it
7 believes it can make a successful showing of malice." Id. at 26.

8 Greensprings then filed a Second Amended Complaint -- having
9 reached a settlement with the Millers, only the Attorney Defendants
10 were named as defendants. ECF No. 63 ("SAC"). Greensprings
11 attached to its SAC correspondence between Attorney Defendants and
12 the Millers which it claims shows Attorney Defendants filed the
13 Miller complaints with the knowledge that the claims asserted were
14 invalid and for the improper purpose of extracting a settlement.
15 Id. The SAC additionally alleged that portions of the Miller FAC -
16 - in which Defendants allege Dillon, Bohn, Greensprings, and Briggs
17 to be part of a "conspiracy" to defraud Turchen -- were taken from
18 a superseded pleading in the Anderson action and stated without
19 probable cause and with malice. Id. ¶¶ 35-36.

20 Attorney Defendants then appealed the Court's July 28, 2009
21 Order, arguing that the Court erred when it granted Greensprings
22 leave to amend its complaint. ECF No. 64. Attorney Defendants
23 also filed a second anti-SLAPP motion to strike. ECF No. 76. The
24 Court sua sponte terminated the motions and stayed the case pending
25 the outcome of Attorney Defendants' appeal. ECF No. 110.

26 In a published opinion, the Ninth Circuit found that it lacked
27 jurisdiction over Attorney Defendants' appeal because the July 28,
28 2009 Order was neither a final decision on the merits nor an order

1 conclusively resolving "claims of right separable from, and
2 collateral to, rights asserted in the action." Greensprings
3 Baptist Christian Fellowship Trust v. Cilley, 629 F.3d 1064, 1070
4 (9th Cir. 2010). In doing so, the Ninth Circuit did not reach the
5 merits of Attorney Defendants' claim that the district court erred
6 in giving Greensprings leave to amend. Attorney Defendants
7 subsequently renoticed their anti-SLAPP motion.

8 9 **III. LEGAL STANDARD**

10 To determine whether to grant an anti-SLAPP motion brought
11 under section 425.16 of California's Code of Civil Procedure, a
12 court must undertake a two-step process. First, the defendant
13 filing the anti-SLAPP motion must show that the cause of action
14 arises from "any act of that person in furtherance of the person's
15 right of petition or free speech under the United States or
16 California Constitution in connection with a public issue"
17 Cal. Civ. Proc. Code § 425.16(b)(1). If the defendant meets this
18 burden, then the burden shifts to the plaintiff non-movant to
19 demonstrate a probability of prevailing on the merits. DuPont
20 Merck Pharm. Co. v. Super. Ct., 78 Cal. App. 4th. 562, 567 (Ct.
21 App. 2000). "The plaintiff need only establish that his or her
22 claim has 'minimal merit.'" Soukup v. Law Offices of Herbert
23 Hafif, 39 Cal. 4th 260, 291 (2006) (citations omitted). Evidence
24 submitted by both parties may be considered, and although "the
25 court does not weigh the credibility or comparative probative
26 strength of competing evidence, it should grant the motion if, as a
27 matter of law, the defendant's evidence supporting the motion
28 defeats the plaintiff's attempt to establish evidentiary support

1 for the claim." Wilson v. Parker, Covert & Chidester, 28 Cal. 4th
2 811, 821 (2002). Evidence must be of the type admissible at trial,
3 and averments made on information and belief will not suffice.
4 Salma v. Capon, 161 Cal. App. 4th 1275, 1289 (Ct. App. 2008).

5
6 **IV. DISCUSSION**

7 Greensprings concedes that Attorney Defendants' actions in
8 litigating the Miller action were taken in furtherance of their
9 right of petition. See Opp'n. Hence, to survive Attorney
10 Defendants' anti-SLAPP motion, Greensprings must demonstrate its
11 malicious prosecution claim has "minimal merit" such that there is
12 a probability of prevailing on its merits.

13 To prevail on a malicious prosecution claim, a plaintiff must
14 show that the prior action "(1) was commenced by or at the
15 direction of the defendant and was pursued to a legal termination
16 favorable to the plaintiff; (2) was brought without probable cause;
17 and (3) was initiated with malice." Soukup, 39 Cal. 4th at 292.
18 In its July 28, 2009 Order, the Court determined that the Miller
19 action terminated in favor of Greensprings and that Miller was
20 brought without probable cause. July 29, 2009 Order at 18-22.
21 Therefore, the only issue before the Court is whether Greensprings
22 has made the required "minimal showing" of malice on the part of
23 Attorney Defendants in litigating the Miller action.

24 "Evidence of malice is typically drawn from inferences and
25 circumstantial evidence." Paulus v. Bob Lynch Ford, Inc., 139 Cal.
26 App. 4th 659, 675 (Ct. App. 2006). Malice "is not limited to
27 actual hostility or ill will toward the plaintiff. Rather, malice
28 is present when proceedings are instituted primarily for an

1 improper purpose." Sierra Club Foundation v. Graham, 72 Cal. App.
2 4th 1135, 1157 (Ct. App. 1999). California courts have identified
3 a number of examples of an "improper purpose":

4 [T]he principal situations in which the civil
5 proceedings are initiated for an improper
6 purpose are those in which (1) the person
7 initiating them does not believe that his claim
8 may be held valid; (2) the proceedings are
9 begun primarily because of hostility or ill
10 will; (3) the proceedings are initiated solely
11 for the purpose of depriving the person against
12 whom they are initiated of a beneficial use of
13 his property; (4) the proceedings are initiated
14 for the purpose of forcing a settlement which
15 has no relation to the merits of the claim.

16 Albertson v. Raboff, 46 Cal. 2d 375, 383 (1953).

17 There is considerable case law in California on the question
18 of what constitutes malice on the part of an attorney defendant.
19 While "a lack of probable cause in the underlying action, by
20 itself, is insufficient to show malice," Daniels v. Robbins, 182
21 Cal. App. 4th 204, 225 (Ct. App. 2010), "an attorney may be held
22 liable for continuing to prosecute a lawsuit discovered to lack
23 probable cause." Zamos v. Stroud, 32 Cal. 4th 958, 960 (2004).
24 While negligence by an attorney defendant in failing to conduct
25 adequate research prior to the filing of a complaint does not alone
26 establish malice, Grindle v. Lorbeer, 196 Cal. App. 3d 1461, 1467-
27 68 (Ct. App. 1987), "[i]f the prior action was not objectively
28 tenable, the extent of a defendant's attorney's investigation and
research may be relevant to the further question of whether or not
the attorney acted with malice," Daniels, 182 Cal. App. 4th at 226.

In finding the lack-of-probable cause requirement to be
satisfied in its July 28, 2009 Order, the Court found that "at
least some of these claims lacked probable cause because the legal

1 theory asserted was wholly inapplicable." See July 28, 2009 Order
2 at 21. Thus, if Greensprings can produce evidence that Attorney
3 Defendants knew that legal theories underlying the Millers' claims
4 were fatally flawed such that there was no possibility a court
5 could find otherwise, they will have met their burden under the
6 first prong of Albertson.

7 Whereas Greensprings's evidence in opposition to the first
8 anti-SLAPP motion consisted of a single pre-litigation document,
9 Greensprings's opposition to the current Motion is considerably
10 more robust. Having settled with the Millers, Greensprings submits
11 declarations by Bob, Anne, and Barbara Miller -- attached to which
12 is correspondence between the Millers and Attorney Defendants.
13 Included in this correspondence is the e-mail sent by Cilley to Bob
14 on July 30, 2007 analyzing the potential claims available against
15 Greensprings and other Miller defendants, see July 30, 2007 Op.
16 Letter; the e-mail sent by Cilley to Bob on August 8, 2007
17 suggesting that the Miller Family Charitable Foundation had no
18 causes of action against Greensprings and should not be named as a
19 plaintiff, see Aug. 7, 2007 Letter; an October 17, 2007 e-mail from
20 Schmuck to Barbara providing details of Attorney Defendants'
21 informal investigation into the Miller defendants, Rice Decl. Ex. J
22 ("Oct. 17, 2007 E-mail"); a February 26, 2008 intra-firm memorandum
23 from Schmuck to Cilley evaluating Greensprings's motion to dismiss
24 the SAC; Rice Decl. Ex. H ("Feb. 26, 2008 Memorandum"); an April
25 24, 2008 letter from Cilley to Bob and Barbara advising them on the
26 strengths and weaknesses of the SAC, Barbara Miller Decl. Ex. K
27 ("Apr. 24, 2008 Letter"); and a May 5, 2008 e-mail sent by Cilley
28 to Greensprings's attorneys proposing to dismiss the case in

1 exchange for a \$350,000 payment from Greensprings to the Miller
2 Family Foundation, Rice Decl. Ex. C ("May 5, 2008 Settlement
3 Offer"). Attorney Defendants do not challenge the authenticity of
4 these exhibits.

5 Attorney Defendants argue that this Court held in its July 28,
6 2009 Order that proof of malice requires more than mere proof of
7 lack of objective probable cause. Mot. at 17. Greensprings
8 counters that the proof submitted shows not only that the initial
9 complaint and FAC were drafted and filed without objective probable
10 cause, but that Attorney Defendants knew they lacked probable cause
11 when they drafted and filed them. Opp'n at 10.

12 Having reviewed the documents submitted in light of the
13 relevant case law, the Court finds that Greensprings has introduced
14 evidence that supports several inferences. The first is that
15 Attorney Defendants did very little research into Greensprings and
16 the other defendants before they filed the Miller initial
17 complaint, and as a consequence, they knew very little about
18 Greensprings and its relationship to Ber, Bohn, and Dillon when the
19 initial complaint was filed. See Oct. 17, 2007 Letter. In the
20 October 17, 2007 Letter, Schmuck reports to the Millers that
21 Greensprings had offices in Santa Rosa, California, and Ashland,
22 Oregon; that it was a 501(c)(3) contribution; that Briggs was its
23 general counsel; that Bohn at one point had authority to write
24 checks on behalf of Greensprings "until that authority was stopped
25 by a preliminary injunction" in Anderson; and that according to
26 pleadings in the Anderson action, Dillon has no connection with
27 Greensprings. Id. If this is all Attorney Defendants knew about
28 Greensprings months after the initial complaint was filed, this

1 lack of pre-filing research into Greensprings is relevant under
2 Daniels to the question of malice.

3 A second and related inference is that Attorney Defendants
4 knew that a court was likely to find many of the causes of action
5 asserted in the initial complaint to be unsupported by probable
6 cause. In the July 30, 2007 Opinion Letter, Cilley frankly
7 discussed the problems with each cause of action later brought in
8 the initial complaint -- chiefly that the Millers had no claim to
9 Turchen's estate and that any promise by Dillon, Bohn, or Briggs to
10 issue a \$500,000 check to the charities of the Millers' choosing
11 was not likely to be found to be supported by consideration or
12 reasonable reliance. In Cilley's August 10, 2007 Letter, he makes
13 clear his belief that the Foundation had no cause of action against
14 Greensprings or the other Miller defendants, writing that the fact
15 that any promise to pay \$500,000 was made to the Millers on behalf
16 of their daughters and not the Foundation was "fatal" to any claim
17 by the Foundation. Id.

18 Were the story to end here, the decision whether to grant or
19 deny Attorney Defendants' Motion would be difficult. Attorney
20 Defendants cite Sangster v. Paetkau, 68 Cal. App. 4th 151, 164 (Ct.
21 App. 1998) for the proposition that "litigants have the right to
22 present issues that are arguably correct even if it is extremely
23 unlikely that they will win." Attorney Defendants' actions --
24 while arguably unwise in hindsight -- could be seen as consonant
25 with the attorney's duty to zealously represent the interests of
26 his or her clients within the bounds of the law. California State
27 Auto. Ass'n Inter-Ins. Bureau v. Bales, 221 Cal. App. 3d 227, 231
28 (Ct. App. 1990). There is a subtle difference between knowing that

1 a claim is not supported by probable cause and suspecting a court
2 will find a claim to be unsupported by probable cause. The
3 documents submitted by Greensprings clearly support the latter;
4 whether they support the former is a closer question.

5 The story does not end here, however. If there were any
6 doubts as to whether the Millers' causes of action were lacking in
7 probable cause, Magistrate Judge Larson's order dismissing the
8 initial complaint removed them. This order stated that the Millers
9 must demonstrate that Anne and Molly were entitled to the \$500,000
10 from Turchen, Turchen's estate, or the estate of Turchen's deceased
11 son, Ward Anderson. Cilley believed that this order raised "a
12 hurdle which we cannot overcome." Apr. 24, 2008 Letter at 3
13 (emphasis added). Cilley wrote that the challenges raised by
14 Magistrate Judge Larson's order "cannot be overstated because it
15 forms at least a part of the basis for most of our causes of action
16 against the defendants in the First Amended Complaint." Id. Yet
17 despite these considerations, the FAC was filed and ultimately
18 dismissed with prejudice for failing to clear this hurdle. Because
19 "an attorney may be held liable for continuing to prosecute a
20 lawsuit discovered to lack probable cause," Zamos, 32 Cal. 4th at
21 960, this evidence is sufficient to satisfy Greensprings' burden on
22 the issue of malice.

23 In addition, the FAC included new allegations that
24 Greensprings was part of a "conspiracy" to defraud Turchen, and
25 that Greensprings agreed to make a \$500,000 donation to charities
26 identified by the Millers to avoid "increased scrutiny." See
27 Miller FAC. Given that no such conspiracy is discussed in the
28 numerous litigation documents submitted to the Court, the

1 similarity between these allegations and allegations made in a
2 superseded Anderson complaint, and Attorney Defendants' failure to
3 submit documents tending to prove the existence of such a
4 conspiracy, a reasonable fact finder could conclude they were
5 lifted from the Anderson complaint and unsupported by probable
6 cause. As such, this evidence is sufficient to show Attorney
7 Defendants knew these allegations were not supported by probable
8 cause when they made them.

9 Based on the above, Greensprings has put forward evidence
10 supporting its allegation that Attorney Defendants brought claims
11 against Greensprings that were unsupported by probable cause and
12 legally untenable in light of the facts that were known by Attorney
13 Defendants. This evidence is far from conclusive as to the
14 ultimate issue of Attorney Defendants' liability for malicious
15 prosecution, which is not yet before the Court. It is possible
16 that a reasonable fact-finder could find Attorney Defendants were
17 merely representing the Millers with the required zeal and without
18 malice. However, Greensprings has conclusively cleared anti-
19 SLAPP's "minimal merit" hurdle with this evidence. As such, the
20 Court DENIES Attorney Defendants' Motion.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **V. CONCLUSION**

2 For the foregoing reasons, the Court DENIES the Motion to
3 Strike brought by Defendants James Cilley, Mark Schmuck, and
4 Temmerman, Cilley & Kohlmann, LLP. A Status Conference is
5 scheduled for June 24, 2011, at 10:00 a.m. in Courtroom 1,
6 Seventeenth Floor, U.S. Courthouse, 450 Golden Gate Avenue, San
7 Francisco, California, 94102. Parties shall file an amended joint
8 Case Management Statement by June 17, 2011.

9
10 IT IS SO ORDERED.

11
12 Dated: May 26, 2011

13 
14 UNITED STATES DISTRICT JUDGE
15
16
17
18
19
20
21
22
23
24
25
26
27
28